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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

TERRY STEWART, Director, Arizona Department of Corrections, et al., *Petitioners*,

v.

RAMON MARTINEZ-VILLAREAL, *Respondent*.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE STATES OF CALIFORNIA, ALABAMA, DELAWARE, IDAHO, INDIANA, KANSAS, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NORTH CAROLINA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, SOUTH DAKOTA, TEXAS, UTAH, WYOMING IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

1. Whether the limitations on the habeas corpus authority of the federal courts to entertain second or successive petitions, as set forth in the Antiterrorism and Effective Death Penalty Act of 1996 (the Act), bar the litigation of competency to be executed claims.

2. Whether the limitations on the habeas corpus authority of the federal courts to entertain second or successive petitions, as set forth in the Act, violate the Suspension of the Writ Clause.

3. Whether, and by what means, can this Court review these issues.

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INTEREST OF AMICI CURIAE

Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 ("the Act") which contains several statutory limitations on the habeas corpus jurisdiction of the federal courts over state court judgments, including limitations on entertaining second or successive habeas corpus petitions. The application of those limitations divests the federal courts of the power to consider present competency to be executed claims in habeas corpus proceedings. The presentation of present competency to be executed claims in turn would be left to the process afforded by individual States. Amici are responsible for defending presumptively valid state judgments, including death penalty judgments, against federal habeas corpus challenges. Amici's interests would therefore be served by a resolution of the questions presented.[1]

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1. This brief is submitted in support of petitioners by amici

SUMMARY OF ARGUMENT

The question of whether the Act's stringent limitations on second or successive habeas corpus petitions survive constitutional review --- though they deprive the federal courts of the power to entertain present competency to be executed claims --- is inextricably intertwined with the nature of those statutory limitations. These limitations operate on the power and authority of the federal courts, because, absent certain stringent exceptions, the limitations divest federal courts from declaring what the law is as to any claim presented in a second or successive petition, and mandate dismissal. Such a drastic limit on the power and authority of the federal courts to entertain second or successive habeas corpus actions render the provisions jurisdictional in nature.

The power to confer, limit, or oust the subject matter jurisdiction of the federal courts, including their habeas corpus jurisdiction, rests with Congress under Article III of the United States Constitution. Since the time of the Framers, Congress and the courts alike have operated with the understanding that Congress possesses wide discretion to confer, limit, or oust jurisdiction as policy considerations of separation of powers and federalism may require. This understanding of Congress' power has never wavered, be it in the context of a habeas corpus statute or otherwise. Nor has the Suspension Clause ever been viewed as undermining that power.

It is especially proper for this Court to accord its traditionally wide deference to Congress' cabining of

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through their respective Attorneys General in accordance with Rules 37.2 and 37.5 of the Rules of the United States. Amici will brief neither the first nor third question presented as they understand that those questions will be thoroughly addressed in other briefs. *See* Rule 37.1 of the Rules of the United States.

federal court jurisdiction where some alternative state process exists. If any recent congressional enactment demonstrates Congress' solicitude for maintaining a vibrant political structure of dual federal-state sovereignties, it is this one.

ARGUMENT

Congress Properly Exercised Its Article III Power To Divest Federal Courts Of Jurisdiction Over Present Competency To Be Executed Claims By Enacting New Limitations On Second Or Successive Habeas Corpus Petitions

By enacting the Act, Congress has substantially changed the federal habeas corpus landscape in which state criminal convictions are collaterally reviewed by federal courts. Congress recognized that state courts could and should be entrusted with greater responsibility, latitude, and deference in their enforcement of federal constitutional rights. Congress therefore chose to enhance the ultimate integrity and finality of state laws and judgments by limiting the habeas corpus authority of the federal courts to review state proceedings in sections 104, 105, and 106 of Title I of the Act. *See* Pub. L. 104-132, 110 Stats. 1217. At issue here are the limitations on second or successive habeas corpus petitions in section 106(b) of Title I of the Act, codified at 28 U.S.C. § 2244(b).

Because section 2244(b) of the Act severely curtails the power of the federal courts to entertain second or successive habeas corpus petitions, Congress has effectively imposed a broad barrier to the exercise of federal habeas corpus jurisdiction as to such petitions. Federal subject matter jurisdiction, including habeas corpus jurisdiction, is not "self-executing" under the Constitution. Rather, it is conferred and regulated by Congress. *See Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 807 (1986). Article III of the United States Constitution grants Congress the power to

shape federal court jurisdiction as policy considerations of federalism and separation of powers may dictate.

Consequently, a determination as to whether section 2244(b) operates as a jurisdictional limitation on the habeas corpus power of the federal courts is a necessary prerequisite to consideration of the substantive issues of section 2244(b)'s constitutionality. *See Arkansas v. Farm Credit Services of Central Arkansas*, 520 U.S. ___, 117 S.Ct. 1776, 1779 (1997). If section 2244(b) is viewed as a jurisdictional "governor" on the habeas corpus power of the federal courts, then the constitutionality of its divesting habeas corpus jurisdiction from those courts, including over competency to be executed claims, becomes an almost foregone conclusion notwithstanding the Suspension Clause.

A. The Act's Limitations On The Power Of The Federal Courts To Entertain Second Or Successive Petitions Cabin The Federal Courts' Exercise Of Their Subject Matter Jurisdiction Over Habeas Corpus Cases

Article III provides in relevant part that the "appellate jurisdiction" of this Court, and of those "inferior" federal courts established by Congress, is subject to definition by Congress, which is empowered to make "such Exceptions and . . . such Regulations," as Congress deems fit. U.S. Const. Art. III, §§ 1, 2, cl. 2. Construing Article III, this Court has found that "[t]he Congressional power to ordain and establish inferior courts includes the power of 'investing them with jurisdiction either limited, concurrent, or exclusive, and of withholding jurisdiction from them in the exact degree and character which to Congress may seem proper for the public good.'" *Lockerty v. Phillips*, 319 U.S. 182, 187 (1943) (internal citations omitted). The threshold question, then, is whether section

2244(b) operates on the Article III subject matter jurisdiction of the federal courts by its new limits on the power and the authority of the federal courts to entertain habeas corpus challenges to state court judgments.

Congressional statutes granting or withdrawing jurisdiction generally "'speak to the power of the court rather than the rights or obligations of the parties.'" *Landgraf v. USI Film Prods.*, 511 U.S. 244, 274 (1994) (internal citation omitted); *see Bruner v. United States*, 343 U.S. 112, 116-7 (1952). As members of this Court explained just last term in construing 28 U.S.C. § 2254(d) of the Act,

> It shares the most salient characteristics of jurisdictional statutes: its commands are addressed to courts rather than individuals. Section 2254(d) does not address criminal defendants, or even state prosecutors; it prescribes or proscribes no private conduct. Instead, it is addressed directly to federal courts, providing, '[a]n application for a writ of habeas corpus *shall not be granted. . . unless . . .*' . . . .

Lindh v. Murphy, ___ U.S. ___, 117 S.Ct. 2059, 2071-72 (1997) (Rehnquist, C.J., dissenting, joined by Scalia, Kennedy, and Thomas, J.J.) (emphasis in original).

Section 2244(b), too, shares "the most salient characteristics" common among jurisdictional statutes. Its commands are addressed directly to the power of the federal courts, rather than the rights and obligations of the parties. *See Landgraf*, 511 U.S. at 274. It provides, for example, that "[a] claim presented in a second or successive habeas corpus action that was presented in a prior application *shall be dismissed*." 28 U.S.C. § 2244(b)(1) (emphasis added).

This strong signal of commonality with jurisdictional statutes is not muted by the failure of section 2244(b) to employ the talismanical word "jurisdiction." The mere presence or absence of the word jurisdiction in

a federal statute does not operate as the condition *sine qua non* for ascertaining whether that statute operates on the subject matter jurisdiction of the federal courts. *See, e.g., Farm Credit Serv.*, 117 S.Ct. at 1778 (explaining that the Tax Injunction Act is "first and foremost a vehicle to drastically limit federal district court jurisdiction. . . .");[2] *Sumner v. Mata*, 449 U.S. 539, 547 n.2 (1981) (pre-Act section 2254(d) was intended by Congress to limit federal habeas corpus jurisdiction).[3]

Nor is the signal sent by Section 2244(b) one which on closer examination turns out to be a reflection of mere artifice. Section 2244(b) in fact constitutes a limitation on the Article III habeas corpus jurisdiction of the federal courts. "Jurisdiction over applications for federal habeas corpus is controlled by statute." *Brown v. Allen*, 344 U.S. 443, 460 (1953); *accord, e.g., Lonchar v. Thomas*, 517 U.S. ___, 116 S.Ct. 1293, 1298 (1996). This principle has been a long standing one. As Chief Justice Marshall explained, "for the meaning of the term habeas corpus, resort may unquestionably be had to the common law; but the power to award the writ by any of the courts of the United States, must be given by written law." *Ex Parte Bollman*, 8 U.S. (4 Cranch) 74, 93-4 (1807). This is a reflection of the fundamental principle that federal

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2. The Tax Injunction Act provides that "[t]he district court shall not enjoin, suspend, or restrain the assessment, levy, or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." *Farm Credit. Serv.*, 117 S.Ct. at 1778.

3. Pre-Act section 2254(d) provided in relevant part: "In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a state court, a determination after a hearing on the merits of a factual issue made by a State court of competent jurisdiction . . . shall be presumed to be correct, ..." 28 U.S.C. § 2254(d) (West. 1996) (prior to its being amended and restated as 28 U.S.C. § 2254(e) in the Act).

subject matter jurisdiction is not "self-executing" -- it is granted and regulated by Congress. *See, e.g., Merrell Dow*, 478 U.S. at 807.

Congress first extended the federal courts' habeas corpus jurisdiction to encompass claims made by state prisoners in 1867. *Felker v. Turpin*, ___ U.S. ___, 116 S.Ct. 2333, 2338 (1996).[4] The 1867 Act is currently codified at 28 U.S.C. §§ 2241(c)(3) and 2254(a).[5] *See, e.g., Felker*, 116 S.Ct. at 2338 n.2 ("This language from the 1867 Act is the direct ancestor of § 2241(c)(3) . . ."); *id.*, at 2339 n.4 (section 2254 is "declaratory of existing law"); *Sumner*, 449 U.S. at 547-8 n.2 ("The present codification of the federal habeas statute [section 2254] is the successor to 'the first congressional grant of jurisdiction to the federal courts,' *Preiser v. Rodriguez*, 411 U.S. 475, 485 (1973), and the 1966 amendments embodied in § 2254(d) were intended by Congress as limitations on the exercise

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4. The 1867 Act, entitled an Act to Amend the Judiciary Act of 1789, states:

> That the several courts of the United States, and the several justices and judges of said courts, within their respective jurisdictions, in addition to the authority already conferred by law, shall have the power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty, in violation of the Constitution, or of any treaty or law of the United States.

Act of Feb. 5, 1867; ch. 28, 14 Stat. 385: *see Ex Parte Yerger*, 75 U.S. (8 Wall.) 85, 86 (1869).

5. Section 2241(c)(3) provides in material part that "[t]he writ of habeas corpus shall not extend to a prisoner unless . . . (3) he is in custody in violation of the Constitution or laws or treaties of the United States . . . ." 28 U.S.C. § 2241(c)(3). Section 2254(a) provides that "[t]he Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a).

of that jurisdiction."). Sections 2241 and 2254, working together, provide the bedrock authority for federal courts to exercise their jurisdiction over the claims of state prisoners. *See, e.g., Felker*, 116 S.Ct. at 2337, 2339; *Greenawalt v. Stewart*, 105 F.3d 1287, 1287 (9th Cir. 1997) (*citing Felker*, 116 S.Ct. at 2339-40); *see also Sumner*, 449 U.S. at 547-8 n.2.

Accordingly, Congress need only modify section 2254 in order to expand or contract the habeas corpus jurisdiction of the federal courts. Both Congress and this Court have operated on this understanding. *See, e.g., Sumner*, 449 U.S. at 547-8 n.2; *Wainwright v. Sykes*, 433 U.S. 72, 101 n.2 (1977) (Brennan, J., dissenting, joined by Marshall, J.) ("Congress, as the primary expositor of federal jurisdiction, remains free to undo the potential restrictiveness of today's decision by expressly defining the standard of intervention under 28 U.S.C. § 2254."); Senate Report No. 1559, Amendment No. 47 (*quoted* in full in "Historical and Statutory Notes" following section 2254 in 1997 Supp. to the U.S.C.A.). The form that Congress chose in the past, with the ultimate approval of this Court, to modify the habeas corpus jurisdiction of the federal courts under section 2254(a) was to enact a separate subsection (*d*) curtailing the habeas corpus authority of the federal courts to relitigate state court adjudications of fact. *See Sumner*, 449 U.S. at 547-8 n.2.[6]

It was against this backdrop that Congress acted to modify the habeas corpus jurisdiction of the federal courts to entertain second or successive petitions under section 2254(a) by enacting section 2244(b). That

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6. It is not an unusual practice for Congress to choose to modify jurisdiction-conferring statutes by enacting separate statutory provisions, codified elsewhere, which effect a limited withdrawal of that jurisdiction. *See, e.g., Hughes Aircraft Co. v. U.S. ex. rel. Schumer*, ___ U.S. ___, 117 S.Ct. 1871, 1874-75, 1878 (1997); *Farm Credit Serv.*, 117 S.Ct. at 1778.

Congress drastically modified the power and authority of the federal courts to entertain second or successive petitions by enacting section 2244(b) can readily be discerned from the statutory language.

Under section 2244(b)(1), federal courts can no longer entertain any claim presented in a second or successive application under section 2254 if it was presented in a prior application. Rather, the federal courts must dismiss that claim. *See* 28 U.S.C. § 2244(b)(1). Under section 2244(b)(2), federal courts can no longer entertain any claim presented in a second or successive application under section 2254, even if it was not otherwise presented in a prior application, unless certain stringent prerequisites are satisfied. *See* 28 U.S.C. § 2244(b)(2).[7] This language acts as a regulator of federal court jurisdiction because, absent specific stringent conditions, it prevents the courts from declaring the law under section 2254(a) and mandates dismissal. "Jurisdiction is the power to declare law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Ex Parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1869).[8]

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7. Under section 2244(b)(2)(A), a new claim presented for the first time in a second or successive application may be entertained if "the claim relies on a new rule of constitutional law made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable. . . ." 28 U.S.C. § 2244(b)(2)(A). Or, under section 2244(b)(2)(B), a new claim presented for the first time in a second or successive application may be entertained if (i) "the factual predicate for the claim could not have been discovered previously through the exercise of due diligence" *and* (ii) "the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2244(b)(2)(B)(i), (ii).

8. The fact that sections 2244(b)(2)(A) and (B) grant habeas corpus jurisdiction to the federal courts in stringently limited circumstances to entertain second or successive applications does not transmogrify section 2244(b) into an operationally nonjurisdictional statute. Take the Tax Injunction Act, which divests the district courts of the jurisdiction to enjoin the collection of state taxes. *See Farm Credit Serv.*, 117 S.Ct. at 1778. Although limited circumstances exist under the Tax Injunction Act in which a district court retains jurisdiction, it is not thereby transmogrified into an operationally nonjurisdictional statute. *See id.*, at 1778-80.

B. Congress Enjoys The Power Under Article III To Proscribe The Federal Courts' Exercise Of Their Subject Matter Jurisdiction Over Habeas Corpus Cases Even Where That Proscription Deprives The Federal Courts Of The Authority To Entertain Present Competency To Be Executed Claims

Once section 2244(b) is viewed in its proper context as a statute regulating the federal courts' habeas corpus jurisdiction as set forth in sections 2241(c)(3) and 2254(a), then the path for ascertaining its constitutionality becomes smooth. The power to proscribe the boundaries of federal habeas corpus jurisdiction *a fortiori* encompasses the power to divest the federal courts of the power to entertain habeas corpus claims, such as present competency to be executed, which fall outside of those boundaries. Congress chose to exercise the power expressly allocated to it under Article III to circumscribe the boundaries of federal habeas corpus jurisdiction. Congress' exercise of that Article III power is entirely constitutional notwithstanding whether the Suspension of the Writ Clause is construed in light of its modern scope, or -- more properly in amici's view -- in light of its scope in 1789. And, Congress' exercise of that power to divest the habeas corpus jurisdiction of the federal courts to entertain present competency to be executed claims

should receive especially wide deference where alternative state process -- coupled with this Court's certiorari power -- exists for the resolution of these claims.

Interpreting the Constitution must begin with its text. *See Nixon v. United States*, 506 U.S. 224, 232-3 (1993). Backtracking to the constitutional starting point here --- Article III --- the text itself countenances an expansive interpretation of Congress' power to grant, limit, or withdraw subject matter jurisdiction. First, section one of that article states not only that "inferior" (i.e. lower) federal courts need not exist at all, but it also vests express discretion in Congress in "ordain[ing] and establish[ing]" those courts. U.S. Const. Art. III, § 1. Moreover, section two of that article provides that --- aside from those relatively few cases in which this Court is granted "original" jurisdiction[9] --- this Court's jurisdiction is subject to definition by Congress which may make "Exceptions" and "Regulations" as it sees fit for this Court's exercise of that jurisdiction. U.S. Const. Art. III, § 2, cl. 2.

When the Framers examined what they had wrought, they took an expansive view of Congress' Article III powers. As Alexander Hamilton wrote,

> If some partial inconveniences should appear to be connected with the incorporation of [the particular powers of the federal judiciary] into the plan, it ought to be recollected that the national legislature will have ample authority to make such *exceptions* and to prescribe such

9. The "original" jurisdiction vested exclusively in this Court exists over cases "affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a party." U.S. Const. Art. III, § 2. Congress cannot add to nor subtract from the original jurisdiction of this Court. *See South Carolina v. Regan*, 465 U.S. 367, 396-98 (1984) (O'Connor, J., concurring, joined by Powell, Rehnquist, J.J.); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 174-75 (1803).

> regulations as will be calculated to obviate or remove these inconveniences.

The Federalist No. 80 (Hamilton), at 408 (Bantam ed. 1982) (emphasis in original). Hamilton would revisit this theme in addressing whether this Court could revisit factual adjudications made by a jury:

> To avoid all inconveniences, it will be safest to declare generally, that the supreme court shall possess appellate jurisdiction, both as to law and fact, and that this jurisdiction shall be subject to such *exceptions* and regulations as the national legislature may prescribe. This will enable the government to modify it in such a manner as will best answer the ends of public justice and security.

The Federalist, No. 81 (Hamilton), at 416 (Bantam ed. 1982) (footnote omitted) (emphasis in original).

Following on the heels of the Constitution's ratification, Chief Justice Marshall soon put pen to paper to convey his view that Article III granted expansive authority to Congress to set the groundwork for the federal courts' exercise of their jurisdiction.

> When the first legislature of the union proceeded to carry the third article of the Constitution into effect, they must be understood as intending to execute the power they possessed of making exceptions in express terms. They have not declared that the appellate power of the Court shall not extend to certain cases; but they have described affirmatively its jurisdiction, and this affirmative description has been understood to imply a negative on the exercise of such appellate power as is not comprehended within it.

Durousseau v. United States, 9 U.S. (6 Cranch) 307, 314 (1810).

Since the early years of the Republic, this Court has continued to reiterate and endorse the view that federal court jurisdiction is not self-executing. Rather, it rises or falls via congressional enactment. *See, e.g., Merrell Dow*, 478 U.S. at 807; *Palmore v. United States*, 411 U.S. 389, 400-01 (1973); *Lockerty*, 319 U.S. at 245; *Klein v. Burke Const. Co.*, 260 U.S. 226, 233-34 (1922); *Cary v. Curtis*, 44 U.S. (3 How.) 236, 245 (1845); *see also Regan*, 465 U.S. at 396-98 (O'Connor, J., concurring, joined by Powell, Rehnquist, J.J.) (contrasting the "appellate jurisdiction" of the federal courts with the "original jurisdiction" of this Court in finding that only in the former circumstance does Congress have the power of determining what cases, if any, should be channelled to the federal courts).

And, Congress has repeatedly resorted to its Article III power to make limited grants of jurisdiction --- or even withdraw previously granted jurisdiction --- without the expression of any qualms on the part of the Court. *See Printz v. United States*, ___ U.S. ___, 117 S.Ct. 2365, 2370 (1997) (*quoting Myers v. United States*, 272 U.S. 52, 175 (1926)) ("contemporaneous legislative exposition of the Constitution . . ., acquiesced in for a long term of years, fixes the construction to be given its provisions."). For example, while Congress set up the federal courts (albeit with limited jurisdiction) as early as the 1789 Judiciary Act, it did not grant the courts general federal-question jurisdiction until the Judiciary Act of 1875. *See Merrell Dow*, 478 U.S. at 807. This Court has long interpreted that statutory grant of federal question jurisdiction as conferring a more limited power on the federal courts than that assigned by the Constitution. *See id.*, at 807-08. The Tax Injunction Act, noted above, qualifies as one example where Congress actually *withdrew* the jurisdiction of the federal courts to interfere with the collection of state taxes. *See Farm Credit Serv.*, 117 S.Ct. at 1778. And, this Court unanimously reaffirmed last term

that the Tax Injunction Act was a "broad jurisdictional barrier" which had to be applied in spite of the wishes of the litigants. *See id.*, at 1779.

But, the case in this area which has played the greatest role in confirming this view of Article III is *Ex Parte McCardle*. In *Ex Parte McCardle*, this Court held that Congress could, by statute, withdraw this Court's appellate jurisdiction over habeas petitions filed under the Habeas Corpus Act. As Justice Chase wrote on behalf of the Court, "[w]e are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution; and the power to make exceptions to the appellate jurisdiction is given by express words. [¶]. . . . Without jurisdiction, the court cannot proceed at all in any cause." *Ex Parte McCardle*, 74 U.S. (7 Wall.) at 514.

By design of the Framers, Article III serves as a means for Congress to check the power of the judiciary where appropriate in order to help ensure balance between the legislative and judicial branches of the Federal Government. *See, e.g., Cary*, 44 U.S. (3 How.) at 245; The Federalist No. 80 (Hamilton), at 408 (Bantam ed. 1982); *see also Merrell Dow*, 478 U.S. at 807-10. At the same time, it provides an opportunity for Congress to safeguard the sovereign interests of the States to carry out their own local affairs and enforce their own local laws without undue federal interference. As this Court expounded just last term,

> It is incontestable that the Constitution provides for a system of "dual sovereignty." Although the States surrendered many of their powers to the new Federal Government, they retained "a residual and inviolable sovereignty." This is reflected throughout the Constitution's text, including (to mention only a few examples) . . .; *the Judicial Power Clause, Art. III, § 2, . . .*."

Printz, 117 S.Ct. at 2376 (emphasis added; internal citations omitted). Where Congress therefore chooses to confine federal court intervention into state affairs via a jurisdiction-withdrawing provision, this Court can and has exhibited a special sensitivity towards interpreting that provision in such a way as to avoid defeating state sovereignty interests. *See Farm Credit Serv.*, 117 S.Ct. at 1780. In the end, Article III constitutes a key cornerstone for the principles of separation of powers and federalism which together undergird our Constitution.

Additionally, implicit in the text of the Constitution itself --- and explicit in subsequent statements of the Framers and of this Court --- is the proposition that state courts possess coordinate and coequal jurisdiction with the lower federal courts to adjudicate federal issues. *See, e.g.,* U.S. Const. Art. III, § 1 (Constitution established a Supreme Court, but made the establishment of lower federal courts optional with Congress); *id.* Art. V., cl. 2 (Constitution announced that "the Law of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby."); The Federalist No. 82 (Hamilton), at 419 (Bantam ed. 1982) ("state courts would have a concurrent jurisdiction in all cases arising under the laws of the union"); *Asarco, Inc. v. Kadish*, 490 U.S. 605, 617 (1988); *Sawyer v. Smith*, 497 U.S. 605, 617 (1989); *Arizonans for Official English v. Arizona*, ___ U.S. ___, 117 S.Ct. 1055, 1064 n.11 (1997).

In what is known as the "Madisonian Compromise," the drafters of the Constitution agreed that it should be left to the policy judgments of Congress to determine whether, and to what extent, cases should be channelled to the lower federal courts. *See* The Federalist, No. 81 (Hamilton), at 412-13 (Bantam ed. 1982); *Regan*, 465 U.S. at 369 (O'Connor, J., concurring, joined by Powell, Rehnquist, J.J.) (". . . because the Framers believed the state courts would be adequate for

resolving most disputes, they generally left to Congress the task of determining what cases, if any, should be channelled to the federal courts."); *Printz*, 117 S.Ct. at 2371; Gunther, *Congressional Power to Curtail Federal Jurisdiction; An Opinionated Guide to the Ongoing Debate*, 36 Stan L. Rev. 895, 912 (1984). It follows that Congress can in its judgment also choose when policy interests would best be served by enacting legislation designating the States as the preferred forum for litigating federal issues.

The Suspension of the Writ Clause provides that "[t]he privilege of the writ of habeas corpus shall not be suspended unless when in cases of Rebellion or Invasion the public Safety may require it." U.S. Const. Art. I, § 9, cl.2. Amici agree with petitioner, the State of Arizona, that the Suspension Clause should be construed according to the scope of the writ as it existed in 1789. *See* Pet. for Cert., at 13-19. Congress, accordingly, has the power under Article III to withdraw the jurisdiction of the federal courts over any case which would not have been cognizable on federal habeas corpus review in 1789.

But, no matter whether the Suspension Clause is construed in light of its historical or its modern scope, it has never been viewed as any substantial impediment to Congress' exercise of its broad Article III power to regulate the subject matter jurisdiction of the federal courts. *See, e.g., Ex Parte Bollman*, 8 U.S. (4 Cranch) 74, 93-4 (1807) (Marshall, C.J.); *Ex Parte McCardle*, 74 U.S. (7 Wall.) at 514; *Felker*, 116 S.Ct. at 2340; *see also, e.g., Lonchar*, 116 S.Ct. at 1298.

What has been left unanswered in the more than 200 year history of Article III is the residual question of whether Congress could completely divest this Court of all subject matter jurisdiction to review state proceedings, such that state proceedings would be entirely unreviewable even on writ of certiorari. *See* Gunther, *supra*, at 909, 914-16 & nn. 62, 72, 113. Wherever the answer may

ultimately lie to that question, the question itself does not even arise in this context where the only constraints which may exist on this Court's discretionary certiorari review of state proceedings are self-imposed for reasons of policy. *See Kyles v. Whitley*, 514 U.S. 419, 422, 440 & n.1 (1995) (Souter, J., writing for a majority of the Court); *id.*, at 454-55 (Stevens, J., concurring, joined by Ginsburg, Breyer, J.J.); *id.*, at 456-60 (Scalia, J., dissenting, joined by Rehnquist, C.J., Kennedy, Thomas, J.J.).[10]

In the present context, section 2244(b) therefore embodies nothing more than a reasonable exercise of Congress' Article III power to regulate the subject matter jurisdiction of the federal courts to entertain habeas corpus claims such as competency to be executed. Where some state process exists for the resolution of such claims which this Court may review as appropriate via its certiorari power, it remains especially appropriate for this Court to apply its long standing deference to Congress' exercise of its Article III power. *See In re Davis*, 121 F.3d 952, 956 (5th Cir. 1997); *In re Medina*, 109 F.3d 1556, 1564 (11th Cir. 1997). Here, most of the capital States have designated a specific process for review of present competency to be executed claims. *See* Appendix.[11]

The effect of section 2244(b) amounts to nothing more in the end than to restrike the balance true between

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10. Presumably, the question of whether certiorari review should be granted on constitutional claims which only concern a dispute of fact continues to remain an appropriately deferential one to the state factfinder. *See Culombe v. Connecticut*, 367 U.S. 568, 603-05 (1961) (opinion of Frankfurter, J.) (state factfinding is conclusive and binding on this Court on direct appeal unless the findings wholly lack support in the evidence); *see also Kyles*, 514 U.S. at 457 (Scalia, J., dissenting); Fed. R. Civ. P. 52(a).

11. In *Ford v. Wainwright*, 477 U.S. 399, this Court listed those capital States which recognize a right of an incompetent defendant not to be executed. *See id.*, at 408 n.2.

state and federal forums in the enforcement of federal rights. And, the exercise of that power to restrike the balance between state and federal fora has never been deemed by this Court to be circumscribed by the Suspension of the Writ Clause at any point in the writ's more than 200 year old history. Nor should it be now.

CONCLUSION

Accordingly, amici respectfully request that this Court reverse the decision of the United States Court of Appeals for the Ninth Circuit, and remand this case to that court for further disposition as appropriate.

Dated: November 25, 1997.

Respectfully submitted,

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APPENDIX

ALABAMA, Ala. Code § 15-16-23 (1996) authorizes suspending the execution of a capital inmate if "it is made to appear to the satisfaction of the trial court that the convict is then insane." If it subsequently is made to appear to the court that such inmate is restored to sanity, the trial court shall order the execution of the judgment and sentence originally awarded in said court. The court may impanel a jury to try the question of insanity or examine "such witnesses as [the court] may deem proper for guidance."

ARIZONA, Ariz. Rev. Stat. Ann. § 13-4022 (1997) authorizes the director of the state department of corrections, the prisoner's attorney, or an attorney for the state, upon "good reason to believe that the prisoner may be mentally incompetent to be executed," to file a motion in the superior court in the county in which the prisoner is located "setting forth the facts relating to the prisoner's conviction and sentence and the facts giving rise to the belief that the prisoner may be mentally incompetent to be executed and requesting the court to order that the prisoner be examined for mental competency to be executed." If a stay of execution is desired, an application for a stay "shall be submitted to the supreme court." On receipt of a motion for examination of competency, the superior court "shall determine if the motion is timely and presents reasonable grounds for the requested examination." If the motion is timely and presents reasonable grounds for the requested examination, the court "shall appoint experts pursuant to the Arizona rules of criminal procedure."

Ariz. Rev. Stat. Ann. § 13-4022 further provides that after the examinations are completed, the court "shall conduct a hearing to determine the

prisoner's competency to be executed." At the hearing, all the parties may present evidence, cross-examine witnesses and present argument or by stipulation may submit the matter for the court's determination on the basis of the experts' reports. There is a presumption that prisoners who are sentenced to death are competent to be executed. A prisoner may be found incompetent to be executed only on "clear and convincing evidence" of incompetency. The superior court "shall specifically state its findings on the record." If the court finds that the prisoner is incompetent, the court "shall suspend the execution and shall immediately transmit a copy of its order to the supreme court." The supreme court may review the superior court's findings. If no review is sought or the supreme court upholds the finding of incompetency to be executed, the director of the state department of corrections "shall deliver the prisoner to the state hospital." The prisoner "shall remain confined at the state hospital until the prisoner becomes competent to be executed."

Ariz. Rev. Stat. Ann. § 13-4023 (1997) orders that after a prisoner recovers competency to be executed, the chief medical officer of the state hospital "shall return the prisoner to the state department of corrections and shall certify to the supreme court that the prisoner is competent."

ARKANSAS, Ark. Code Ann. § 16-90-506 (1987-1995) provides that, "When the Director of the Department of Correction is satisfied that there are reasonable grounds for believing that an individual under sentence of death is not competent, due to mental illness, to understand the nature and reasons for that punishment," the director shall notify the Deputy Director of the Division of Mental Health Services of the Department of Human Services who shall cause an inquiry to be made into the mental condition of the individual within thirty (30) days

of receipt of notification. The Director of the Department of Correction shall also notify the Governor and the prisoner's attorney of record of this action. If the individual is found incompetent due to mental illness, the Governor shall order that appropriate mental health treatment be provided. The director may order a reevaluation of the competency of the individual as circumstances may warrant.

CALIFORNIA, Cal. Pen. Code § 3700.5 (West 1997) orders an examination by three alienists to investigate the sanity of a capital inmate whenever a date has been set upon which a judgment of death shall be executed upon that inmate. Cal. Pen. Code § 3701 (West 1997) orders the warden to notify the district attorney of the county in which the prisoner is situated if, after the inmate's delivery to the warden for execution, "there is good reason to believe that a defendant, under judgment of death, has become insane." The district attorney must "immediately file" a petition in the superior court stating that the defendant is believed to be insane and requesting an inquiry into the defendant's sanity. The superior court "must at once cause to be summoned and impaneled, from the regular jury list of the county, a jury of 12 persons to hear such inquiry."

Cal. Pen. Code § 3703 (West 1997) provides that when the defendant has been found to be insane, the court must order that the defendant be taken to a medical facility of the Department of Corrections, "and there kept in safe confinement until his reason is restored." Cal. Pen. Code § 3704 (West 1997) further orders the warden to suspend the execution upon a finding that the defendant is insane.

COLORADO, Colo. Rev. Stat. Ann. § 16-8-110 (West 1997) mandates that no person shall be "tried, sentenced, or executed if such person is incompetent to

proceed at that stage of the proceedings against him or her." The question of the defendant's competency to proceed shall be raised either (1) If the trial judge has "reason to believe that the defendant is incompetent to proceed;" (2) By motion of either the prosecution or defense made in advance of the commencement of the particular proceeding; or (3) By the affidavit of any chief officer of an institution having custody of a defendant awaiting execution.

Colo. Rev. Stat. Ann. § 16-8-111 (West 1997) orders the district court of the county in which the defendant is confined to make a preliminary finding whether the defendant is competent to be executed "[w]henever the question of a defendant's incompetency to proceed is raised." The court may order a competency examination "or such other investigation as it deems advisable." Upon the written request of either the prosecuting attorney or defense counsel, the court "shall hold a hearing and may commit the defendant for a competency examination prior to the hearing if adequate psychiatric information is not already available." The burden of submitting evidence and the burden of proof by a preponderance of the evidence are upon the party asserting the incompetency of the defendant. At the conclusion of the hearing, the court shall make a final determination.

CONNECTICUT, Conn. Gen. Stat. Ann. § 54-101 (West 1997) authorizes the warden to make an application to the superior court whenever any person awaiting execution of a sentence of death "appears to be insane." After a hearing on the application, the court may appoint three physicians to examine the mental condition of the capital inmate. Upon certificate of a majority of the physicians stating that such inmate is insane, the court must order the sentence of execution

to be stayed and such inmate transferred to a state hospital until he or she recovers sanity.

DELAWARE does not have a statutory provision explicitly requiring the suspension of the execution of a capital inmate who meets the legal test for incompetence. However, Delaware Supreme Court Rule 35(e), authorizes a capital inmate, either pro se or through counsel, to make an application to the superior court for a stay of execution of sentence "in any proceeding, including postconviction proceedings." The superior court's decision "shall be reviewable" by the Delaware Supreme Court. This procedure has been applied in a case where a capital inmate requested a stay of execution to determine his competency to be executed. *Red Dog v. State*, 620 A.2d 848, 849 (1993).

Furthermore, Del. Code Ann. tit. 11, § 406 (1975-1996) concerning the transfer of convicted persons becoming mentally disabled from prison to the Delaware Psychiatric Center, has traditionally been construed to apply to inmates awaiting execution of a death sentence. *See Ford v. Wainwright*, 477 U.S. 399, 408 n.2 (1986). Del. Code Ann. tit. 11, § 406 authorizes the superior court to appoint two physicians to inquire of the mental condition of the prisoner and make a report of their finding to the court "[w]henever in any case it appears to the court, upon information received from the Department of Health and Social Services, that a prisoner confined with the Department has become mentally ill after conviction and sentence." Should the report of the physicians be that the prisoner is mentally ill, "the prisoner shall at once be ordered by the Court transferred from the prison facility where the prisoner is confined to the Delaware Psychiatric Center."

FLORIDA, Fla. Stat. Ann. § 922.07 (West 1997) provides that when the governor "is informed that a person under sentence of death may be insane," the governor "shall stay execution of the sentence with authority to appoint a commission of three psychiatrists to examine the convicted person." Counsel for the convicted person and the state attorney may be present at the examination, and if the convicted person does not have counsel, counsel shall be appointed to represent him or her. If the governor decides that the convicted person does not have the mental capacity to understand the nature of the death penalty and why it was imposed on him or her, the governor "shall have the convicted person committed to a Department of Corrections mental health treatment facility." The capital inmate shall be kept at the mental health treatment facility until he or she has been restored to sanity.

Fla. Rule Crim. Pro. Rule 3.811 (West 1997) provides that a person who "lacks the mental capacity to understand the fact of the impending execution and the reason for it" shall not be executed. Rule 3.811 authorizes the filing of a motion for a stay of execution pending hearing, based on grounds of the prisoner's insanity to be executed, after determination of the Governor of Florida that the prisoner is sane to be executed. The motion must contain a certificate of counsel that the motion is made in good faith and on reasonable grounds to believe that the prisoner is insane to be executed. Counsel for the prisoner and the state "may submit such other evidentiary material and written submissions including reports of experts on behalf of the prisoner as shall be relevant to determination of the issue." Rule 3.811 authorizes the circuit judge to grant a stay of execution if he or she has "reasonable grounds to believe that the prisoner is insane to be executed," and may order further proceedings pursuant to Fla. Rule Crim. Pro. 3.812.

Fla. Rule Crim. Pro. 3.812 (West 1997) authorizes a hearing de novo on the inmate's competency for execution and allows the court to (1) require the presence of the prisoner at the hearing; (2) appoint up to three mental health experts to examine the prisoner and report their findings and conclusions to the court; and (3) "[e]nter such other orders as may be appropriate to effectuate a speedy and just resolution of the issues raised." At the hearing, the court may admit "such evidence as the court deems relevant to the issues," including but not limited to the reports of expert witnesses, and the court "shall not be strictly bound by the rules of evidence." Rule 3.812(e) provides that, if the court finds by clear and convincing evidence that the prisoner is incompetent to be executed, the court "shall enter its order continuing the stay of the death warrant."

GEORGIA, Ga. Code Ann. § 17-10-60 (1982-1997) provides that a person is "mentally incompetent to be executed" if that person "is presently unable to know why he or she is being punished and understand the nature of the punishment." Ga. Code Ann. § 17-10-61 (1982-1997) provides that an incompetent person shall not be executed. Ga. Code Ann. § 17-10-62 (1982-1997) states that this article is the "[e]xclusive procedure for challenging mental competency to be executed. . . ."

Ga. Code Ann. §§ 17-10-63 and 17-10-67 (1982-1997) authorize the filing of an application in the superior court of the county in which the applicant is being detained after "an order has been signed by a judge of the trial court setting a time period for the execution." The application must "clearly set forth alleged facts in support of the assertion that the applicant is presently mentally incompetent to be executed." The application shall also "have attached thereto affidavits, records, or other evidence supporting its allegations," and must be verified with the oath of

the applicant or of some other person in his behalf. Ga. Code Ann. § 17-10-66 (1982-1997) provides that "[b]y filing an application under this article, the applicant specifically consents to submit to a state examination for the purposes of assessing mental competency to be executed." Ga. Code Ann. § 17-10-66 further authorizes the appointment of an expert to examine the applicant. Ga. Code Ann. § 17-10-65 (1982-1997) permits the respondent to answer the application. Upon the filing of an answer, the court "shall schedule the case for a hearing as soon as possible so that the proceedings may move expeditiously."

Ga. Code Ann. § 17-10-68 (1982-1997) permits the court to receive proof by "depositions, oral testimony, sworn affidavits, or other evidence." Section 17-10-68 further requires the court to make "written findings of fact and conclusions of law upon which the judgment is based." If the court finds that the applicant has proven his or her mental incompetence to be executed by a "preponderance of the evidence," the court must "enter an appropriate order with respect to any scheduled execution time period and shall enter such supplementary orders as necessary and proper."

Ga. Code Ann. § 17-10-69 (1982-1997) provides that if the applicant has previously filed an application under this article and has been previously determined to be mentally competent to be executed, such prior adjudication "shall act as a presumption of mental competency and the applicant shall not be entitled to a new hearing on the question of mental competency to be executed absent the applicant's making a prima-facie showing of a substantial change in circumstances sufficient to raise a significant question as to the applicant's mental competency to be executed at the time of filing of any subsequent applications." Ga. Code Ann. § 17-10-70 (1982-1997) prohibits the filing of

an appeal by the applicant unless the applicant first obtains a certificate of probable cause for the appeal from the Supreme Court.

IDAHO, Idaho Code § 18-210 (1948-1997) provides that "[n]o person who as a result of mental disease or defect lacks capacity to understand the proceedings against him or to assist in his own defense shall be tried, convicted, sentenced or punished for the commission of an offense so long as such incapacity endures." Idaho Code § 18-211 provides that "[w]henever there is reason to doubt the defendant's fitness to proceed as set forth in section 18-210," the court shall appoint at least one psychiatrist or psychologist to "examine and report upon the mental condition of the defendant to . . . understand the proceedings." The defendant is permitted to be examined by an expert of his own choice, and such examiner shall be permitted to have reasonable access to the defendant for the purpose of examination.

Idaho Code § 18-212 (1948-1997) provides that, "[w]hen the defendant's fitness to proceed is drawn in question," the issue is to be determined by the court. If either the prosecuting attorney or counsel for the defendant contests the finding of the report filed pursuant to section 18-211, the court must hold a hearing on the issue. If the report is received in evidence at the hearing, the party who contests the finding shall have the right to cross-examine the psychiatrist or licensed psychologist who submitted the report and to offer evidence upon the issue. If the court determines that the defendant "lacks fitness to proceed," the execution shall be suspended, and the court shall commit the defendant to the custody of the director of the department of health and welfare for care and treatment at an appropriate facility of the department of health and welfare.

ILLINOIS, Ill. Stat. ch. 730, § 5/5-2-3 (former Ill. Rev. Stat. ch 38, § 1005-2-3 (1985) (as cited in *Ford*, 477 U.S. at 408 n.2), which provided that a person is "unfit to be executed if because of a mental condition he is unable to understand the nature and purpose of such sentence," was repealed by P.A. 88-350, § 5, effective January 1, 1994. The provision has not been codified in another section of the Illinois Code.

INDIANA does not have a statute explicitly requiring the suspension of the execution of a prisoner who meets the legal test for incompetence. Ind. Code Ann. § 11-10-4-2 (West 1997) generally requires the department of corrections to "provide for the care and treatment of every confined offender who is determined to be mentally ill by a psychiatrist employed or retained by the department." A prisoner may be involuntarily (Ind. Code Ann. § 11-10-4-3 (West 1997)) or voluntarily (Ind. Code Ann. § 11-10-4-4 (West 1997)) transferred to a mental health facility. In the case of a request for a voluntary transfer, the inmate will be examined by a psychiatrist retained by the department of correction who shall report his or her findings to the department. If the report states that the inmate is mentally ill and in need of care and treatment, the department of correction "shall transfer the offender to the division of mental health." In *Ford*, this Court interpreted section 2 of this code as applying to present competency to be executed claims. *See Ford*, 477 U.S. at 408 n.2.

KANSAS, Kan. Stat. Ann. § 22-4006 (1996) authorizes counsel for a convict under sentence of death, or the warden of the correctional institution, to request a determination of the convict's sanity by a district judge of the judicial district in which such convict was tried and sentenced, at any time prior to execution. If the district judge determines that there is "sufficient reason

to believe that the convict is insane," the judge shall "suspend the execution and conduct a hearing to determine the sanity of the convict." The judge must order a psychiatric or psychological examination of the convict by two licensed physicians or licensed psychologists. Subdivision (b) of § 22-4006 provides that the death row inmate "shall have the right to present evidence and cross-examine any witnesses at the hearing." Subdivision (d) states that if the judge determines the convict is insane, the judge shall suspend the execution until further order. Further, any time thereafter when the judge has "sufficient reason to believe that the convict has become sane," the judge shall again "determine the sanity of the convict" as provided by this section. "Proceedings pursuant to this section may continue to be held at such times as the district judge orders until it is either determined that such convict is sane or incurably insane." *Id.*

KENTUCKY, Ky. Rev. Stat. Ann. § 431.240 (Michie 1971-1996) provides that the execution of an insane prisoner shall be suspended "until the condemned is restored to sanity." The commissioner of the Department of Corrections may transfer the condemned person to the state forensic psychiatric facility until the time he or she is restored to sanity. The statute further provides that "[a]ny administrative hearings authorized under authority of this section shall be conducted in accordance with KRS Chapter 13B." The Kentucky Department of Corrections Administrative Regulation 501 KAR 8:010 authorizes a condemned person "seeking to have a scheduled execution date stayed pursuant to [Ky. Rev. Stat. Ann.] § 431.240(2) based on an allegation the condemned person is insane," to file a petition for an administrative hearing with the warden of the Kentucky State Penitentiary. The petition must allege "with specificity" the grounds in support of a

belief the condemned is insane, and be accompanied by "at least one . . . affidavit setting forth facts known to the affiant which allegedly establish probable cause to believe the condemned person is insane." Regulation 501 KAR 8:010 requires the warden to either deny the petition or grant a hearing within 24 hours after the petition has been filed. That section further provides, "[a] ruling denying the petition without a hearing pursuant to this Section shall be the final order of the agency subject to judicial review." If a hearing is granted, the provisions of Ky. Rev. Stat. Ann. § 13B.010-13B.170 shall govern the hearing. The Department of Corrections regulation does not limit the "Governor of the Commonwealth or any court of this Commonwealth in the exercise of any powers they may have to act in any other manner under the law or Constitution of Kentucky."

LOUISIANA has adopted the common law rule, by judicial decision, that one who has been convicted of a capital crime and sentenced to suffer the penalty of death, and who thereafter becomes insane, cannot be put to death while in that condition. *State v. Allen*, 204 La. 513, 515, 15 So.2d 870, 871 (1943); *see Ford*, 477 U.S. at 408 n.2. The procedures for raising the issue of a defendant's mental capacity to be executed are the same as that for a non-capital defendant. *Allen*, 204 La. at 517. La. Code Crim. Proc. Ann. art. 642 (West 1997) authorizes the defense, the district attorney, or the court to raise defendant's mental incapacity to proceed "at any time." When the question of the defendant's mental incapacity to proceed is raised, there shall be "no further steps in the criminal prosecution," until the defendant is found to have the mental capacity to proceed. La. Code Crim. Proc. Ann. art. 643 (West 1997) requires the court to order a mental examination of the defendant when it has "reasonable ground to

doubt the defendant's mental capacity to proceed." Article 643 further requires the court to appoint counsel to represent the defendant if he has not already retained counsel. La. Code Crim. Proc. Ann. art. 644 (West 1997) mandates the appointment of a "sanity commission" to "examine and report upon the mental condition of the defendant." The sanity commission consists of at least two and not more than three physicians who are qualified by training or experience in forensic evaluations. La. Code Crim. Proc. Ann. art. 647 (West 1997) provides that the issue of the defendant's mental capacity to proceed shall be determined by the court in a "contradictory hearing." The report of the sanity commission is admissible in evidence at the hearing, and members of the sanity commission may be called as witnesses by the court, the defense, or the district attorney. Further, article 647 permits the introduction of "other evidence pertaining to the defendant's mental capacity to proceed" at the hearing.

La. Code Crim. Proc. Ann. art. 648 (West 1997) provides that the "criminal prosecution" shall be resumed unless the court determines by "clear and convincing evidence" that the defendant does not have the mental capacity to proceed. If the court determines that the defendant lacks mental capacity to proceed, the "proceedings" shall be suspended.

MARYLAND, Md. Ann. Code art. 27, § 75A (1978-1997) provides that an incompetent inmate is one "who, as a result of a mental disorder or mental retardation, lacks awareness: 1. Of the fact of his or her impending execution; and 2. He or she is to be executed for the crime of murder." The execution of such an inmate is forever prohibited, and the incompetent is thereby sentenced to life imprisonment. Md. Ann. Code art. 27, §75A(c) authorizes the inmate, the inmate's counsel, or

if the inmate is not represented by counsel, any other person on the inmate's behalf, to file a petition alleging that the inmate is incompetent and seeking to revoke the warrant to execute the death sentence. "Upon the filing of such a petition, the court may in its discretion stay any warrant of execution that was previously issued and has not yet expired." Unless the inmate is already represented by counsel, the court "shall promptly appoint the public defender, or . . . other counsel to represent the inmate in the proceeding." The inmate must submit to an examination and evaluation by one or more psychiatrists of the State's choosing, and the inmate is entitled to be independently examined by a psychiatrist of the inmate's choosing. Unless the parties waive a hearing, an evidentiary hearing will be held to determine the inmate's competence. Md. Ann. Code art. 27, §75A(c)(9) provides that at the hearing, the inmate has the right to be present, to offer evidence, cross-examine witnesses, and make argument. The inmate has the burden of establishing incompetence by a "preponderance of the evidence." If the court finds the inmate to be incompetent, it must stay any warrant of execution and remand the case to the court in which the sentence of death was imposed. That court must "strike the sentence of death and enter in its place a sentence of life imprisonment without the possibility of parole."

MISSISSIPPI, Miss. Code Ann. § 99-19-57(2) (1996) provides that if a convict under a sentence of death becomes insane, the provisions of that section "shall be the exclusive procedural and substantive procedure." Under section 99-19-57(2)(b), a person shall be deemed "insane" if the court finds the convict "does not have sufficient intelligence to understand the nature of the proceedings against him, what he was tried for, the purpose of his punishment, the impending fate which

awaits him, and a sufficient understanding to know any fact which might exist which would make his punishment unjust or unlawful and the intelligence requisite to convey such information to his attorneys or the court." Section 99-19-57(2)(a) authorizes "[t]he convict, or a person acting as his next friend, or the commissioner of corrections" to file an application seeking post conviction relief with the Mississippi Supreme Court. If the court finds the inmate to be insane, execution of the sentence must be suspended. The inmate will then be committed to the state hospital until the inmate regains his or her sanity.

MISSOURI, Mo. Ann. Stat. § 552.060 (Vernon 1997) provides, "[n]o person condemned to death shall be executed if as a result of mental disease or defect he lacks capacity to understand the nature and purpose of the punishment about to be imposed upon him or matters in extenuation, arguments for executive clemency or reasons why the sentence should not be carried out." Section 552.060 requires the director of the department of corrections to "immediately" notify the governor if the director has "reasonable cause" to believe that any inmate sentenced to death has a mental disease or defect excluding fitness for execution. The governor must "forthwith order a stay of execution of the sentence" if there is not sufficient time between such notification and time of execution for a determination of the mental condition of such person without such stay. Each of the parties is entitled to an examination by a physician of their own choosing. The circuit court must then conduct an "inquiry" into the mental condition of the capital inmate. Section 552.060 further provides that "[i]f the court, after such inquiry, certifies to the governor and to the director that the prisoner has a mental disease or defect . . . the offender shall not be executed but shall be held in the correctional facility

subject to transfer to a mental hospital." If the offender is thereafter certified by the director as free of a mental disease or defect, the governor "shall fix a new date for the execution." Section 552.060 also provides, "[n]othing in this chapter shall be construed to limit the governor or any court in the exercise of any of their powers in any other manner under the law or Constitution of Missouri."

MONTANA, Mont. Code Ann. § 46-19-201 (1996) provides, "If after judgment of death there is good reason to suppose that the defendant lacks mental fitness, the mental fitness of the defendant will be determined in accordance with the provisions of chapter 14 of this title." Mont. Code. Ann. § 46-14-221 (1996) (chapter 14) permits "[t]he issue of the defendant's fitness to proceed" to be raised by the court, the defendant, the defendant's counsel, or by the prosecutor. When the issue is raised, it must be determined by the court. The court may make the determination of the defendant's fitness based on the findings of the mental health experts' reports filed pursuant to section 46-14-206 if "neither the prosecutor nor the defendant's counsel contests the finding of the report." If either party contests the finding in the report, the court is required to hold a hearing. If the report is received in evidence, the parties have the right to "subpoena and cross-examine the psychiatrists or licensed clinical psychologists who joined in the report and to offer evidence upon the issue." Mont. Code Ann. § 46-19-202 (1996) provides that, "[i]f it is found that defendant [sentenced to death] is mentally fit . . . the warden of the Montana state prison shall execute the judgment." If the defendant is found to be unfit to proceed, the execution of judgment must be suspended and the court must commit the defendant to the state hospital "for as long as the lack of fitness endures."

Subsection (3) of section 46-19-202 states that when the court, "on its own motion or upon application of the superintendent of the Montana state hospital, the county prosecuting officer, or the defendant or the defendant's legal representative, determines after a hearing . . . that the defendant has regained fitness to proceed, the warden must be directed by the court to carry out the execution." Section 46-19-202 further provides, "If, however, the court is of the view that so much time has elapsed since the commitment of the defendant that it would be unjust to proceed with execution of the sentence," the court may suspend the execution of the sentence and may order the defendant to be discharged.

NEBRASKA, Neb. Rev. Stat. § § 29-2537 (1996) provides, "If any convict under sentence of death shall appear to be mentally incompetent," the warden must notify a judge of the district court of the judicial district in which the convict was tried and sentenced. The judge is required to make "such investigation as shall satisfy him or her as to whether a commission ought to be named to examine such convict." If the judge determines that there is not sufficient reason for the appointment of a commission, the judge may refuse to suspend the execution of the inmate. If the judge determines that a commission should be appointed to examine the inmate, if necessary the judge "shall suspend the execution" and appoint the "three superintendents of the state centers at Lincoln, Hastings, and Norfolk" as a commission to examine the convict. The commission is required to examine the inmate to determine whether he or she is mentally competent or incompetent. "If two of the commission shall find the convict mentally incompetent, the judge shall suspend his or her execution until further order." If, at "[a]ny time thereafter," it is "made to appear" to

the judge that the inmate has become mentally competent, the judge must again appoint a commission who must make another investigation as to the mental competency of the inmate. "Such proceedings may be had at such times as the judge shall order until it is either determined that the convict is mentally competent or incurably mentally incompetent."

NEVADA, Nev. Rev. Stat. Ann. § 176.415 (Michie 1995) provides that the execution of the death penalty may be stayed pending the investigation into the sanity of the convicted inmate. Nev. Rev. Stat. Ann. § 176.425 (Michie 1995) provides that if there is "good reason to believe" that a defendant sentenced to death has become insane, the director of the department of prisons may petition a district judge "in writing, verified by a physician," and alleging the present insanity of the capital inmate. The judge must then appoint two psychiatrists and/or psychologists to examine the inmate and conduct a hearing to determine whether the inmate is insane. The judge may stay the execution pending the determination of the sanity of the inmate if he or she determines that the hearing and the determination cannot be had before the date of the execution. Nev. Rev. Stat. Ann. § 176.435 (Michie 1995) requires the attendance of the capital inmate and the attorney general or his deputy at the hearing. The district attorney and defense counsel may also attend the hearing. The report of the examining physicians must be submitted to the court which may require the production of "other evidence." The attorney for the capital inmate, or such inmate if he or she is without counsel, is permitted to "introduce evidence and cross-examine any witness, including the examining physicians." Nev. Rev. Stat. Ann. § 176.455 (Michie 1995) provides that, if the court finds the convicted person to be insane, the judge "shall make and enter an

order staying the execution of the judgment of death until the convicted person becomes sane," and order the director of the department of prisons to confine such person in a "safe place of confinement until his reason is restored."

NEW HAMPSHIRE does not have a statute explicitly requiring the suspension of the execution of a prisoner who meets the legal test for incompetence. N.H. Rev. Stat. Ann. § 651:10 (1995) authorizes the governor and council, or the superior court, to transfer any prisoner who is insane to the "secure psychiatric unit," whenever they are "satisfied that such . . . transfer will be conducive to the health and comfort of the person and the welfare of the public."

NEW JERSEY, N.J. Stat. Ann. § 30:4-82 (West 1981), as cited in *Ford, supra*, 477 U.S. at 408 n.2, was repealed in 1989 by L.1987, c. 116, § 30. New Jersey does not have a statute explicitly requiring the suspension of the execution of a prisoner who meets the legal test for incompetence.

However, N.J. Stat. Ann. § 30:4-27.1 (West 1997) provides procedures for involuntary confinement of mentally ill inmates who are a danger to themselves or to others. N.J. Stat. Ann. § 30.4-27.10(a), (d) allow commitment proceedings to be initiated by psychiatric personnel or by the New Jersey Attorney General. Upon receiving documents in support of commitment, the trial court must immediately review them to determine if there exists probable cause to believe that the person is in need of involuntary confinement. *Id.* §30:4-27.10(f). If the court finds that there is probable cause to believe that the inmate is in need of involuntary commitment, then the court shall authorize the admission of the inmate into a facility pending a final hearing. *Id.* § 30.4-27.10(g). (Death row inmates

may remain on death row while receiving psychiatric treatment. *Matter of Savage*, 558 A.2d 1357, 1359-60 (N.J. App. Div. 1989).) An inmate subject to involuntary commitment receives a hearing within 20 days regarding the necessity of continued commitment at which he receives the opportunity to representation by counsel, to present evidence, and to cross-examine witnesses. *Id.* §30.4-27.12(a), .14, .15(d). If the court finds that the inmate no longer needs continuing treatment, it must order him to be returned to the appropriate prison to continue serving his or her sentence. *Id.* § 30.4-27.15(d).

NEW MEXICO, N.M. Stat. Ann. § 31-14-4 (1978-1997) provides, "If, after his delivery to the warden for execution, there is good reason to believe that a defendant, under judgment of death, has become insane," the warden must notify the district attorney. The district attorney must "immediately file in the district court of such county a petition, stating the conviction and judgment, and the fact that the defendant is believed to be insane, and asking that the question of his sanity be inquired into." It is the "duty of said court to inquire into said question and render judgment thereon." N.M. Stat. Ann. § 31-14-5 (1978-1997) requires the district attorney to attend the hearing, who "may produce witnesses before the court." N.M. Stat. Ann. § 31-14-6 (1978-1997) provides that if the court finds the capital inmate to be insane, the inmate must be taken to the state hospital "and there kept in safe confinement until his reason is restored." N.M. Stat. Ann. § 31-14-7 (1978-1997) requires suspension of the execution if the capital inmate is found to insane. The court must then deliver the inmate to the superintendent of the state hospital for the insane. "When the defendant recovers his reason, the superintendent of such hospital must certify that fact

to the governor, who must thereupon issue to the warden his warrant, appointing a day for the execution of the judgment."

NEW YORK, N.Y. Correct. Law § 656 (McKinney 1997) prohibits the state from executing a capital inmate who is incompetent. Section 656 states that an inmate is "incompetent" when, "as a result of mental disease or defect, he lacks the mental capacity to understand the nature and effect of the death penalty and why it is to be carried out." Upon the filing of a petition in the supreme court, the court "shall issue an order staying the execution if and to the extent a stay is necessary to permit determination of the petition." The court must also appoint a commission of three psychiatric examiners to inquire into the inmate's competence and report to the court as to their findings. The examination of the capital inmate must "promptly take place with all three of the psychiatric commissioners present at the same time." Section 656 also authorizes, upon application of the inmate or the district attorney, an examination by a psychiatrist or psychologist designated by the inmate or the district attorney. Section 656 requires the appointment of counsel upon the filing of a petition if the inmate does not have counsel and is financially unable to obtain counsel. Subdivision four of § 656 requires the psychiatric commissioners to "receive and consider evidence" offered by the inmate's counsel and the district attorney, including "written submissions, testimony and expert psychiatric evidence." The parties have the right to cross-examine witnesses at the proceeding before the psychiatric commissioners. Section 656 provides that if a majority of the psychiatric commissioners finds the inmate to be incompetent, the court must accept such finding "unless clearly erroneous." The court must then enter an order finding the inmate to be incompetent

and stay the execution of the inmate. If the court rejects, however, the finding of a majority of the psychiatric commissioners on the ground that it is clearly erroneous, the court is required to appoint another commission to proceed as provided in § 656. Section 656 further provides, "Any other provision of law notwithstanding, no other review, judicial or otherwise, shall be available with respect to an order finding the inmate to be incompetent or competent." However, subsequent petitions may be filed in the supreme court. Upon the filing of a subsequent petition, the court may not issue an order staying the execution of the inmate unless the court finds that there is "reasonable cause to believe that the inmate is incompetent."

NORTH CAROLINA, N.C. Gen. Stat. § 15A-1001(a) (1944-1996) provides that, "[n]o person may be tried, convicted, sentenced, or punished for a crime when by reason of mental illness or defect he is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner." N.C. Gen. Stat. § 15A-1002 (1944-1996) provides that incapacity to proceed may be raised "at any time" on motion by the prosecutor, the defendant, the defense counsel, or the court. N.C. Gen. Stat. § 15A-1002(b) requires the court to hold a hearing to determine the defendant's capacity to proceed. The court is authorized to appoint one or more impartial medical experts to examine the defendant and return a written report describing the present state of the defendant's mental health. If the report indicates that the defendant lacks capacity to proceed, "proceedings for involuntary civil commitment under Chapter 122C of the General Statutes may be instituted." The court may make "appropriate temporary orders for the confinement or security of the

defendant pending the hearing or ruling of the court on the question of the capacity of the defendant to proceed."

OHIO, Ohio Rev. Code Ann. § 2949.28 (Baldwin 1997) presently provides, "If a convict sentenced to death appears to be insane, the warden . . . shall give notice thereof to a judge of the court of common pleas of the county in which the prisoner is confined." The judge must then "inquire into such insanity" or impanel a jury for that purpose. Section 2949.28 further mandates that execution of the sentence "shall be suspended pending completion of the inquiry."

As of the date of the filing of this Appendix, a proposed amendment to Ohio Rev. Code Ann. § 2949.28 has passed the Ohio Senate. It would add the following provision: "(A) As used in this section and section 2949.29 of the Revised Code, 'insane' means that the convict in question does not have the mental capacity to understand the nature of the death penalty and why it was imposed upon the convict." The present version of section 2949.28 would then be amended as follows: "(B)(1) If a convict sentenced to death appears or claims to be insane, the warden . . ., the convict, the convict's counsel, or a psychiatrist or psychologist who has examined the convict shall give notice of the apparent or claimed insanity to whichever of the following is applicable: (a) if the convict was tried by a jury, to the judge who imposed the sentence upon the convict or, if that judge is unavailable, to another judge of the same court of common pleas; (b) if the convict was tried by a three-judge panel, to any of the three judges who imposed the sentence upon the convict or, if each of those judges is unavailable, to another judge of the same court of common pleas." Subdivision (2) of the proposed amendment to § 2949.28(B) requires the

judge to inquire into the convict's sanity and to give notice of the inquiry to the convict and the convict's counsel in addition to the prosecuting attorney. As in the current provision, the proposed amendment would require execution of the sentence "be suspended pending completion of the inquiry." Additionally, subdivision (2) of the proposed amendment would require the court to appoint counsel to represent the convict in the inquiry, and to appoint one or more psychiatrists to examine the convict.

Ohio Rev. Code Ann. § 2949.29 (Baldwin 1997) currently provides that the "warden or sheriff, the judge of the court of common pleas, clerk of the court of common pleas, and prosecuting attorney" must attend the inquiry commenced as provided in § 2949.28 of the Revised Code. "Witnesses may be produced and examined before the judge or jury, and all findings shall be in writing signed by the judge or jury. If it is found that the convict is not insane, the sentence shall be executed at the time previously appointed, unless such time has passed pending completion of the inquiry, in which case the judge conducting the inquiry shall appoint a time for execution. If it is found that the convict is insane, the judge shall suspend the execution until the warden or sheriff receives a warrant from the governor directing such execution as provided in section 2949.30 of the Revised Code."

As of the date of the filing of this Appendix, a proposed amendment to Ohio Rev. Code Ann. § 2949.29 has passed the Ohio Senate. Pursuant to the proposed amendment, § 2949.29 would read as follows:

> (A) The prosecuting attorney, the convict, and the convict's counsel shall attend an inquiry commenced as provided in section 2949.29 of the Revised Code. The prosecuting attorney

> and the convict or the convict's counsel may produce, examine, and cross-examine witnesses, and all findings shall be in writing signed by the judge. If it is found that the convict is not insane, the sentence shall be executed at the time previously appointed, unless that time has passed pending completion of the inquiry, in which case the judge conducting the inquiry shall appoint a time for execution not to exceed 10 days from the finding of the court.
>
> (B) If it is found that the convict is insane, the judge shall continue the stay of execution of sentence previously issued, order the convict to be confined in the area to which other convicts sentenced to death are confined, and order treatment of the convict. Thereafter, the court at any time may conduct and, on motion of the prosecuting attorney, shall conduct a hearing to continue the inquiry into the convict's insanity. If the court finds at the hearing that the convict is not insane and if the time previously appointed for execution of the sentence has not passed, the sentence shall be executed at the previously appointed time. If the court finds at the hearing that the convict is not insane and if the time previously appointed for execution of the sentence has passed, the judge who conducts the hearing shall appoint a new time for the execution not to exceed 10 days from the finding of the court.
>
> (C) In all proceedings under this section and section 2949.28 of the Revised Code, the burden of proof of insanity is upon the convict by a preponderance of the evidence, and the

court shall find that the convict is not insane unless the court finds by a preponderance of the evidence that the convict is insane.

(D) Proceedings for inquiry into the insanity of any convict sentenced to death shall be exclusively pursuant to this section, section 2949.28 of the Revised Code, and the Rules of Evidence. Neither Chapter 5122. or 5123. of the Revised Code nor any other provision of the Revised Code or any other rule concerning mentally ill persons, mentally retarded persons, or insane persons applies to any proceeding for inquiry into the insanity of any convict sentenced to death.

(E) The appellate court in which the appeal is filed shall expedite any appeal from a decision rendered pursuant to this section or section 2949.28 of the Revised Code. No court shall order a stay of execution exceeding sixty days pending the appeal.

Ohio Rev. Code § 2949.30 (Baldwin 1997) provides that if a convict under sentence of death is found insane under § 2949.29 of the Revised Code, and if he is subsequently restored, the warden must notify the governor who "when convinced that the convict is of sound mind," shall issue a warrant appointing a time for his execution.

OKLAHOMA, Okla. Stat. Ann. tit. 22, § 1005 (West 1997) requires that once there is "good reason" to believe that a capital inmate has become insane, the warden must notify the district attorney of the county in which the prison is situated. The district attorney must "immediately" file in the district or superior court of

such county a petition "stating the conviction and judgment and the fact that the defendant is believed to be insane and asking that the question of his sanity be inquired into." The court must "at once cause to be summoned and impaneled from the regular jury list a jury of twelve persons to hear such inquiry." Okla. Stat. Ann. tit. 22, § 1006 (West 1997) requires the attendance of the district attorney at the inquisition. The district attorney may produce witnesses at the hearing. Okla. Stat. Ann. tit. 22, § 1007 (West 1997) requires that if the capital inmate is found to be insane, the court must order that he or she be taken to one of the state hospitals for the insane and "there kept for safe confinement until his reason is restored." Okla. Stat. Ann. tit. 22, § 1008 (West 1997) further provides that if the capital inmate is found to be sane, the warden "must proceed to execute the judgment." If the inmate is found to be insane, the warden "must suspend the execution" and "deliver the defendant . . . to the superintendent of the hospital." Upon the recovery of the inmate's sanity, the Governor must issue to the warden a warrant appointing a day for the execution of the judgment.

OREGON has no statute or case law explicitly requiring the suspension of the execution of a prisoner who meets the legal test for incompetence.

PENNSYLVANIA has adopted the common law rule, by judicial decision, that one who has been convicted of a capital crime and sentenced to suffer the penalty of death, and who thereafter becomes insane, cannot be put to death while in that condition. *Commonwealth v. Jermyn*, 539 Pa. 371, 374, 652 A.2d 821, 822-23 (1995); *Commonwealth v. Moon*, 383 Pa. 18, 22, 117 A.2d 96, 99 (1955). An inmate may receive an evidentiary hearing in front of the Court of Common Pleas in order to

litigate his competency to be executed. *See Jermyn*, 539 Pa. at 373, 375-6.

SOUTH CAROLINA does not have a statute explicitly requiring the suspension of the execution of a prisoner who meets the legal test for incompetence. S.C. Code § 17-27-160 (1996) provides capital case post-conviction relief procedures. S.C. Code § 44-23-220 (1996) provides generally that, "[n]o person who is mentally ill or mentally retarded shall be confined for safekeeping in any jail." That section authorizes an examination of the person, and if in the opinion of the two examiners designated by the Department of Mental Health admission to a mental health facility is warranted, the officer in charge of the jail "shall commence proceedings pursuant to Sections 44-17-510 through 44-17-610, or Section 44-21-90." This Court has interpreted this latter code section as being applicable to competency to be executed claims. *See Ford*, 477 U.S. at 408 n.2.

SOUTH DAKOTA, S.D. Codified Laws § 23A-27A-22 (1968-1997) provides that if a capital inmate "appears to be mentally incompetent to proceed," the warden must notify the Governor "forthwith." The Governor is required to appoint a commission of three to five physicians to examine the inmate and report to the Governor as to the capital inmate's mental condition at the time of the examination. S.D. Codified Laws § 23A-27A-23 (1968-1997) requires the commission to "take the oath required of referees as prescribed by the Supreme Court rule for trial courts of record." The commission must give at least seven days' notice of the time of such examination to the attorney general, the state's attorney who tried or participated in the trial of the inmate, and counsel for the capital inmate. The attorney general or one of his assistants or the state's attorney or a deputy must, and counsel for the inmate

may, attend the examination, and any of the attorneys "may take part in the proceedings before the commission." The commission is authorized to "call and examine witnesses, administer oaths and compel the attendance of witnesses." After the examination has been completed, the commission must submit a written report to the Governor with the opinion of the commission as to the mental condition of the capital inmate. S.D. Codified Laws § 23A-27A-24 (1968-1997) provides that the Governor "shall suspend the execution of sentence" if the commission finds the defendant mentally incompetent to proceed. Thereafter, the commission must review the defendant's mental condition at least once every six months during his confinement.

TENNESSEE does not have a statute explicitly requiring the suspension of the execution of a prisoner who meets the legal test for incompetence. But Tennessee has adopted the common law rule, by judicial decision, that one who has been convicted of a capital crime and sentenced to suffer the penalty of death, and who thereafter becomes insane, cannot be put to death while in that condition. *Jordan v. State*, 124 Tenn. 81, 89-90, 135 S.W. 327, 329 (1911).

TEXAS currently does not have a statute explicitly requiring the suspension of the execution of a capital inmate who meets the legal test for incompetence. At common law, Texas forbade execution of the insane, and the 1879 through 1965 Codes of Criminal Procedure all contained statutes explicitly barring execution of the insane and setting out the general procedures to be followed once the issue was raised. *Ex parte Jordan*, 758 S.W.2d 250, 253 (1988). However, in 1975, the legislature "completely rewrote [Tex. Code

Crim. Proc. Ann., Art.] 46.02 and inexplicably omitted the section dealing with execution competency." *Id.*

Tex. Code Crim. Proc. Ann. art. 46.01, Sec. 2.(a) (West 1997) provides that a prisoner "not under death sentence" may be transferred to a state mental hospital if a prison physician is of the opinion that the prisoner is mentally ill and would benefit from treatment in a mental hospital. As did the court in *Ex parte Jordan*, 758 S.W.2d at 254 n.8, amici note herein that *Ford*, 477 U.S. at 408 n.2, incorrectly cites Tex. Code Crim. Proc. Ann. art. 46.01 as an example of a State statute which provides for suspension of execution and transfer to a mental facility for a capital inmate who has developed mental illness.

Nevertheless, the Texas Court of Criminal Appeals in *Ex parte Jordan* reaffirmed the common law rule that one who has been convicted of a capital crime and sentenced to suffer the penalty of death, and who thereafter becomes insane, cannot be put to death while in that condition. Further, the *Jordan* court approved the following procedures as "comport[ing] with the constitutional considerations discussed in *Ford*" for determining whether a capital inmate is competent to be executed (*Ex parte Jordan*, 758 S.W.2d at 254): (1) a capital inmate may file a postconviction application for writ of habeas corpus pursuant to Tex. Code Crim. Proc. Ann. arts. 11.07 and/or 11.071 (West 1997). (2) Once the competency issue has been raised, the trial court should appoint an independent psychologist to examine the applicant. (3) Following the examination, the trial judge should afford the applicant a "full adversarial hearing" to determine his or her competency. (4) At the hearing, the applicant is entitled to counsel, and given an "opportunity to be heard, present evidence, and cross-examine witnesses." (5) The judge must determine whether the applicant is "capable of comprehending the nature, pendency and

purpose of his execution." (6) If the judge finds the capital inmate to be incompetent, a stay of execution is authorized pending regained competency. (7) The judge should order a re-evaluation of the inmate every ninety days. (8) A capital inmate is not entitled to a transfer to a mental hospital for treatment, but rather is only entitled to treatment using prison's in-house resources. *Id.* at 251, 254.

UTAH, Utah Code Ann. § 77-19-8 (1953-1997) provides that the execution of a judgment of death may be suspended in cases of "suspected incompetency." Utah Code Ann. § 77-19-13 (1953-1997) provides that if there is "good reason" to believe the capital inmate is incompetent to proceed, the executive director of the Department of Corrections must immediately give written notice to the court in which the judgment of death was rendered, the prosecuting attorney, and counsel for the inmate. The judgment will be stayed pending further order of the court. Section 77-19-13(2)(a) requires an examination of the mental condition of the capital inmate. If the inmate is found incompetent, the court must "immediately transmit a certificate of the findings to the Board of Pardons and Parole and enter an order for commitment under Title 77, Chapter 15."

VIRGINIA has no statute or case law explicitly concerning the suspension of the execution of a capital inmate who meets the legal test for incompetence. Va. Code § 19.2-177.1 (1949-1997) (former Va. Code § 19.2-177) does provide generally that the person having custody over an inmate may petition for a mental commitment proceeding in accordance with the procedures provided in Chapter 2 (§ 37.1-63 et seq.) of Title 37.1. But, the Virginia Supreme Court ruled in July of 1987 that section 19.2-177, cited in *Ford, supra*,

477 U.S. at 408 n.2 and the direct ancestor of the present statute, did not apply to death penalty cases. *Whitley v. Commonwealth*, (Va. Sup. Ct. Order, Rec. No. 870704, July 2, 1987).

WASHINGTON has adopted the common law rule, by judicial decision, that one who has been convicted of a capital crime and sentenced to suffer the penalty of death, and who thereafter becomes insane, cannot be put to death while in that condition. *State v. Harris*, 114 Wash.2d 419, 437, 789 P.2d 60, 70 (1990); *State v. Davis*, 6 Wash.2d 696, 717, 108 P.2d 641, 651 (1940).

Independent of any statutory authority, Washington state courts "possess an inherent power to act upon a showing of supervening insanity, and if necessary, to issue a stay of execution to permit a proper and adequate investigation to be made." *Davis*, 6 Wash.2d at 717. In *Harris*, the Washington Supreme Court set out the procedures for adjudicating competency to be executed claims.

The *Harris* court observed that death row inmates would be deemed competent to be executed "if they understand that they have been sentenced to death for murder and can communicate rationally with counsel." *Harris*, 114 Wash.2d at 427. A claim of competency to be executed may be raised in the Washington Superior Court. *Id.*, at 437-8. The superior court may stay a capital inmate's execution while its inquiry is in process. *Id.* The superior court may grant an evidentiary hearing on a claim of competency to be executed if the inmate makes a "substantial showing" that he is presently insane for purposes of execution. That showing may be made by "affidavits, depositions, medical reports, or other credible evidence sufficient to demonstrate that there exists a genuine question regarding petitioner's present sanity." *Id.*, at 435-36. If the court decides that the capital inmate's showing is

insufficient, the court "shall enter an appropriate order, supported by detailed findings of fact, denying the motion for a hearing." *Id.*, at 436.

If the capital inmate has shown that he is entitled to an evidentiary hearing, the inmate is entitled to notice of the hearing, to be present at the hearing, to be represented by counsel, to present all material relevant evidence and argument necessary to overcome the "strong presumption of sanity," and to cross-examine the opposing party's witnesses. *Id.*, at 436, 439-40. The court's conclusion regarding the inmate's competency shall be a "finding of fact." *Id.*, at 440. This finding of fact shall be detailed and in writing. *Id.*

The Washington Supreme Court "shall expedite appellate review" of competency to be executed claims. *Id.*, at 441. "Procedural error . . . should be reviewed as a question of law. However, the court's findings of fact on disputed facts, including the court's ultimate finding on petitioner's sanity or insanity, would not be disturbed on review if supported by substantial evidence." *Id.* If the capital inmate is found to be incompetent to be executed, he may, at the option of the Department of Corrections, be transferred to a state hospital for treatment provided he receives a judicial adversarial hearing regarding the need for treatment. *Id.*, at 442. Or, he may be committed under state statutes providing for the commitment of the mentally ill. *Id.*, at 442-3.

Finally, the *Harris* court provided that if "submissions" by the parties to the superior court "indicate[d] the defendant had regained his competency, a hearing could be held to determine whether the stay [of execution] should be dissolved." *Id.*, at 443.

WYOMING, Wyo. Stat. § 7-13-901 (1977-1997) defines "[r]equisite mental capacity" as "the ability to understand the nature of the death penalty and the reasons it was

imposed." Subdivision (b) of that section provides that if it "appears to any custodian or other interested person" that a capital inmate "does not have the requisite mental capacity," the custodian or interested person must "immediately give notice in writing to the court." The notice to the court must be accompanied "by all psychiatric or psychological reports or evaluations made of the convict since the imposition of the death sentence." Wyo. Stat. § 7-13-902 (1977-1997) authorizes the court, upon a finding that "there is reasonable cause to believe that the convict does not have the requisite mental capacity," to stay the execution and order an examination of the inmate. Within five (5) days after receiving a copy of the report of the examination of the capital inmate, the inmate's counsel or the state may obtain an order granting them an examination by a designated examiner of their own choosing. Subdivision (e) of section 7-13-902 provides that if the opinion contained in the examination report is contested by any party, the court must conduct a hearing. At the hearing, the parties are authorized to "summon and cross-examine the persons who provided the report or rendered opinions contained therein and offer evidence upon the issue of the convict's requisite mental capacity." Section 7-13-902(f) provides that upon "clear and convincing evidence" that the capital inmate does not have the requisite mental capacity, the judge "shall suspend the execution" of the inmate "until a time when it is found that the convict has the requisite mental capacity." Section 7-13-902(h) requires the appointment of counsel to represent the inmate during the proceedings if he or she is not already represented. Section 7-13-902(j) provides that the capital inmate "shall have an opportunity to be heard either personally or through his counsel" at the competency hearing. Further, the inmate may introduce "any relevant evidence bearing upon the convict's requisite mental

capacity." Wyo. Stat. § 7-13-903 (1977-1997) reiterates that the capital inmate's execution must be suspended if the court finds that the inmate does not have the requisite mental capacity. Section 7-13-903 further provides that "a designated examiner shall reexamine the convict at least every twelve (12) months at the direction of the court." A new hearing must be commenced when the designated examiner determines after the examination required by section 7-13-903 "that the conditions justifying the suspension of the execution of the death sentence no longer exist."